Supreme Court, U.S.
FILED
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No.

In The
Supreme Court of the United States

DAVID PARKS HOULT,
PETITIONER,

vs.

JENNIFER HOULT,
RESPONDENT

On Petition For Writ Of Certiorari To The United States Court of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL J. CONNOLLY
Counsel of Record
KELLEY A. JORDAN-PRICE
LAURA B. ANGELINI
HINCKLEY, ALLEN & SNYDER LLP
28 State Street
Boston, MA 02109
(617) 345-9000

Blanchard Press, Inc. 617-426-6690

QUESTION PRESENTED FOR REVIEW

Does ERISA's anti-alienation clause, 29 U.S.C. § 1056(d)(1), restrict the alienation of ERISA funds once they have been distributed to the pensioner?

LIST OF PARTIES

The parties to this case are Petitioner David Parks Hoult and Respondent Jennifer Hoult.

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OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit (Lynch, J.) (App., A-1–A-18) was issued on June 22, 2004, and is reported at 373 F.3d 47, 32 Employee Benefits Cas. 2938 (1st Cir. 2004). No Petition for Rehearing was sought.

STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY AND REGULATORY PROVISIONS

1. The Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, provides as follows:

> Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

29 U.S.C. § 1056(d)(1). (App., A-36).

2. Regulations promulgated by the Department of the Treasury relative to the alienation of pension benefits provide in pertinent part:

> (b) *No assignment or alienation – (1) General Rule.* Under section 401(a)(13), a trust will not be qualified unless the plan of which the trust is a part provides that benefits provided under the plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, gar-

nishment, levy, execution or other legal or equitable process.

26 C.F.R. § 1.401(a)-(13)(b)(1). (App., A-36).

* * *

(c) *Definition of assignment and alienation – (1) In general.* For purposes of this section, the terms "assignment" and "alienation" include –

* * *

(ii) Any direct or indirect arrangement (whether revocable or irrevocable) whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan in, or to all or any part of a plan benefit payment which is, or may become payable to the participant or beneficiary.

26 C.F.R. § 1.401(a)-(13)(c)(1)(ii). (App., A-36).

* * *

STATEMENT OF THE CASE

On May 30, 2002, the United States District Court for the District of Massachusetts, on Respondent's motion, entered an Order requiring Petitioner to "place all monies, income or funds he receives from any source in a single Massachusetts bank account in his name only" and to "not make any withdrawals from the Account except for $2,900 per month" to pay a judgment obtained by Respondent and against Petitioner for personal injuries. (App., A-19) Petitioner is a retiree-member of the Massachusetts Institute of Technology ("MIT") Retirement Plan. Through the MIT Retirement Plan, Petitioner receives fixed-sum, monthly pension benefits during his lifetime. (App., A-1, A-4). The MIT Retirement Plan is an Employee Retirement Income Security Act of 1974 (ERISA) Plan that provides ERISA protected pension benefits. *Id.*

On July 22, 2002, Petitioner moved, *inter alia*, to strike his ERISA pension benefits from the Order. On August 2, 2002, the District Court denied Petitioner's Motion to Strike (App., A-21), and Petitioner thereafter appealed that denial to the First Circuit. On appeal, Petitioner contended, among other things, that the Order violates ERISA's anti-alienation provision, which is codified at 29 U.S.C. § 1056(d)(1).

On June 22, 2004, the First Circuit issued an opinion upholding the District Court's denial of the Motion to Strike ERISA benefits from the Order. (*See* App., A-1–A-18). The First Circuit based its decision on a finding that "ERISA's anti-alienation provision does not apply where, as here, the funds have already been disbursed to the plan beneficiary." *Id.* A-12–A-13.

The basis for jurisdiction in the court of first instance was 28 U.S.C. § 1332.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUIT COURTS OF APPEAL HAVE ISSUED CONFLICTING DECISIONS ON THE IMPORTANT ISSUE OF WHETHER ERISA'S ANTI-ALIENATION PROVISION PROTECTS PENSION FUNDS ONCE THEY HAVE BEEN DISTRIBUTED TO THE PENSIONER

This case poses the important question of whether ERISA's anti-alienation clause prevents the alienation of ERISA funds once they have been distributed to the pensioner — an issue with which lower courts have grappled, with conflicting results.

The anti-alienation clause states that, "each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1). (App., A-36). Under the plain language of this clause, ERISA pension funds are clearly protected from creditors while they are in the hands of the plan administrator. What the Circuit Courts of Appeal have conflicted over is whether this provision continues to protect the funds from creditors once they have been disbursed to the pensioner. As the following will show, the legislative history of ERISA's anti-alienation provision, which has been cited in prior decisions from this Court, reflects a congressional intent that such protection continues to extend to the funds once they have been distributed to the pensioner. Petitioner respectfully seeks this Court's affirmation of said congressional intent.

A. ERISA's Relevant Legislative History.

A review of ERISA's relevant legislative history reveals a strong public policy against the alienation of an ERISA plan participant's benefits *at anytime*. ERISA's legislative history provides that its "most important purpose" is to:

> [A]ssure American workers that they may look forward with anticipation to a retirement with financial security and dignity, and without fear that in this period of life they will be lacking in the necessities to sustain them as human beings within our society.

S.Rep. No. 93-127, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4849. (App., A-22). Among those provisions that were specifically designed to "further ensure that the employee's accrued benefits are actually available for retirement purposes" is the requirement that benefits not be assigned or alienated. H.R. Rep. No. 93-807, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N., 4734. (App., A-26).

ERISA's anti-alienation provision must be construed in a way that effectuates its intended purpose: to protect the funds for use during retirement. This can be achieved only through a ruling that the funds remain inviolate to creditors' claims after they have been paid to pensioners. Any other interpretation risks complete subversion of the statute's intent, as it would allow a creditor to seize the funds upon payment to the pensioner, thereby extinguishing the pensioner's legislatively-ensured right to use them during retirement.

A provision contained in the original statute, which has since been deleted, provides further guidance on this

important issue. As originally codified, Section 206(d)(2) of ERISA provided a narrow exception to the anti-alienation provision in the case of "any voluntary and revocable assignment not to exceed 10 percent of any benefit payment . . . ." App., A-33. The legislative history for this section provided in pertinent part:

> [A] plan must provide that benefits under the plan may not be assigned or alienated. However, the plan may provide that after a benefit is in pay status, there may be a voluntary revocable assignment (not to exceed 10 percent of any benefit payment) by an employee which is not for purposes of defraying the administrative costs of the plan. For purposes of this rule, a garnishment or levy is not to be considered a voluntary assignment.

H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess.(1974), *reprinted in* 1974 U.S.C.C.A.N. 5037, 5061. (App., A-28).

Under the original statute, a pensioner could assign a maximum of 10% of a benefit that was in pay status. Because only a maximum 10% of a benefit in pay status could be assigned, a pensioner was prohibited from assigning or alienating the remaining 90% benefit in pay status. *Id.* Moreover, a creditor could not seize or attach the 10% assignment because the permitted assignment could not include a garnishment or levy.

The original codification of the statute thus reflected Congress's clear intention to protect pension funds from creditors' claims into perpetuity, and not just when they were in the hands of the plan administrator. The only logical interpretation for this exception, as originally carved, was that it was intended to allow the pensioner

some freedom to assign a small percentage of the funds, while still restricting the pensioner and third party claimants from seizing the payments when the retiree needs it most — during retirement.

B. This Court's Prior Precedent.

In prior decisions, this Court has specifically recognized ERISA's strong statutory goal in protecting plan benefits for use *during retirement*. For example, in *Guidry v. Sheet Metal Workers Pension Fund, et al.*, 493 U.S. 365, 110 S.Ct. 680, 107 L.Ed.2d 782 (1980)[hereinafter referred to as "*Guidry I*"], this Court considered the propriety of a district court's imposition of a constructive trust on a pensioner's retirement benefits to satisfy a judgment obtained against him. This Court, recognizing that ERISA was designed to safeguard retirement income, noted that the subject provision of "ERISA governs the narrow question of whether the judgment may be collected through a particular means – a constructive trust placed *on the pension,*" and found that it could not. 493 U.S. at 376. In so finding, this Court noted that it is not "appropriate to approve any generalized equitable exception, either for employee malfeasance or for criminal misconduct, to ERISA's prohibition on the assignment or alienation of pension benefits." *Id.* This Court further commented as follows on the legislative purpose behind ERISA's anti-alienation provision:

> Section 206(d) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrong done them. If exceptions to

> this policy are to be made, it is for Congress to undertake that task.

Id.; *see also Patterson v. Shumate*, 504 U.S. 753, 112 S.Ct. 2242, 119 L.Ed.2d 519 (1992)(anti-alienation provision is enforceable restriction with respect to bankruptcy estate of pension plan beneficiary).

This Court's decision in *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979), also supports this interpretation of ERISA's anti-alienation provision. In *Hisquierdo*, this Court considered whether it was proper to allow a spouse, in a divorce case, to gain an interest in her husband's pension benefits which were due under the Railroad Retirement Act. The Railroad Retirement Act contains anti-alienation provisions substantially similar to those found in ERISA (prohibiting annuity funds from being subject to assignment, anticipation, garnishment, attachment or other legal process, with statutory exceptions for child support and alimony). *Id.* at 576. This Court found that the pension annuities could not be alienated even once they were disbursed to the beneficiary, noting that any other result "... runs contrary to the language and purpose of [the statute] and would mechanically deprive petitioner of a portion of the benefit Congress . . . indicated was designed for him alone." *Id.* at 583, 591.[1]

[1] *See also Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361, 100 S.Ct. 1723, 1726, 64 L.Ed.2d 354 (1980) (noting that it was the intent of Congress to insure that pension benefits will actually be received upon retirement by plan participants and beneficiaries.) Quoting the *Guidry I* stream of income language, this Court, in *Patterson v. Shumate*, 504 U.S. 753, 112 S.Ct. 2242, 2247, 119 L.Ed.2d 519 (1992), also held that the Court should be vigorous in enforcing ERISA's prohibition on assignment or alienation, and declined to recognize any implied exceptions to the broad statutory bar.

As this Court has previously recognized, there is a strong congressional policy in favor of safeguarding the ERISA stream of income for use during retirement. This policy can only be advanced if the anti-alienation clause continues to protect the funds when the retiree actually takes possession of those funds, i.e., during retirement. Nevertheless, despite ERISA's strong policy to protect funds during retirement and clear legislative history that was cited by this Court in *Guidry I*, many courts have found that the anti-alienation provision offers no protection to the funds once they have been distributed to the pensioner.

C. The Conflict Among The Circuits.

Following *Guidry I*, the First, Second, Third, Fourth, Ninth and Tenth Circuits all have issued decisions on this issue, with conflicting results. (*See* App., A-1–A-18); *Robbins v. DeBuono*, 218 F.3d 197 (2nd Cir. 2000); *Wright v. Riveland*, 219 F.3d 905 (9th Cir. 2000); *United States v. Smith*, 47 F.3d 681 (4th Cir. 1995); *Trucking Employees of North Jersey Welfare Fund, Inc. v. Colville*, 16 F.3d 52 (3rd Cir. 1994); *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 39 F.3d 1078 (10th Cir. 1994). The First, Second, Third, Ninth and Tenth Circuits have determined that ERISA's anti-alienation provision does not restrict the alienation of pension funds once they have been distributed to the pensioner. The Fourth Circuit has held that, although funds disbursed from an ERISA plan before an employee has retired are not protected from creditors, funds paid as an annuity for retirement purposes are so protected.

Petitioner urges that the position of the Fourth Circuit is consistent with the congressional goal of protecting ERISA funds for use during retirement, while the

decisions of the other circuits undermine that goal. Petitioner respectfully requests this Court's validation on this important issue.

1. The First, Second, Third, Ninth and Tenth Circuit Opinions

The Tenth Circuit was the first circuit court to rule on this issue in *Guidry v. Sheet Metal Workers International Association, Local 9*, 10 F.3d 700 (10th Cir. 1998)[hereinafter "*Guidry II*"], a case that was decided after remand from this Court in *Guidry I*. Despite the legislative history discussed above and the language employed by this Court in *Guidry I*, the Tenth Circuit found that the plain language of ERISA's anti-alienation provision and its legislative history were inconclusive on whether it continued to protect ERISA benefits following distribution to and receipt by the beneficiary. *Id.* at 1081. Given this "finding," the Tenth Circuit then looked to the language of a Treasury Department Regulation that defines "assignment" and "alienation" as follows:

> Any direct or indirect arrangement (whether revocable or irrevocable) whereby a party acquires from a participant or beneficiary *a right or interest enforceable against the plan* in, or to, all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary.

Id., *quoting* 26 C.F.R. § 1.401(a)-13(c)(1)(ii)(1992) (emphasis added). From this language, the Court then concluded that the terms "alienation" and "assignment" are intended to cover only those arrangements that generate a right "enforceable against a plan," and that benefits are therefore protected by ERISA's anti-alienation

provision *only* if "they are within the fiduciary responsibility of private plan managers." *Id.* at 1082. Once the funds are paid out to the pensioner and are no longer within the plan administrator's fiduciary responsibility, they lose the anti-alienation protection. *Id.*

The First, Second, Third and Ninth Circuits all subsequently issued decisions following the reasoning of the Tenth Circuit in *Guidry II* and concluded that ERISA's anti-alienation provision ceases to protect funds once they have been paid to and received by plan participants and beneficiaries. (App., A-1, A-12–A-13); *Robbins v. DeBuono*, 218 F.3d 197, 203-04 (2nd Cir. 2000); *Wright v. Riveland*, 219 F.3d 905, 919-20 (9th Cir. 2000); *Trucking Employees of North Jersey Welfare Fund, Inc. v. Colville*, 16 F.3d 52, 55-56 (3rd Cir. 1994). None of those courts, however, has even attempted to explain how such a reading squares with the statute's clear legislative history.

As the following will show, the Fourth Circuit opinion is completely consistent with the statute's clear legislative history, and is the only Circuit court opinion that advances Congress's "most important" goal in enacting ERISA: to protect ERISA funds for use during retirement.

2. The Fourth Circuit Opinion of *United States v. Smith.*

Smith pled guilty to one count of an indictment charging him with wire fraud in violation of 18 U.S.C. § 1343. *United States v. Smith*, 47 F.3d at 682. In a restitution order, the district court ordered Smith to turn over, upon receipt each month, the entire amount of his pension benefits payable under an ERISA plan. *Id.* Smith appealed

that restitution order on the basis of ERISA's anti-alienation provision. *Id.* The Fourth Circuit then vacated the district court's restitution order, finding that ERISA's strong legislative purpose compelled another conclusion.

Significantly, the Fourth Circuit decided *Smith* with the benefit of the Third and Tenth Circuits' reasoning in *Colville* and *Guidry*, respectively, and rejected those Circuits' conclusions. The *Smith* court addressed the Tenth Circuit's contention that *Guidry I* addressed only the alienation of funds that had not yet been disbursed to the pension beneficiary and the corollary contention that once pension funds have been distributed, the anti-alienability provision no longer applies. *Id.* at 683. The *Smith* court pointed out that although the Tenth Circuit, upon remand of *Guidry I*, found again that pension funds, once distributed, are no longer protected, *id.*; *see Guidry II*, 10 F.3d 700, and that the Third Circuit had followed this reasoning in *Colville*, 16 F.3d 52, it was declining to adopt that approach, stating:

> We believe that the reasoning in *Guidry II* circumvents the logic of *Guidry* and *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979)
>
> ...We believe there is a distinction between funds disbursed from an ERISA plan before an employee has retired and such funds paid as an annuity for retirement purposes. The Supreme Court has noted that the purpose of ERISA is to safeguard a stream of income for pensioners. *Guidry*, 493 U.S. at 376. Where an employee elects to draw on her ERISA plan prior to her retirement, she forfeits the protection provided by the Act. Where, however, the funds are paid pursuant to the terms of the

> plan as income during retirement years, ERISA prohibits their alienation . . . .

Smith, 47 F.3d at 683.

The *Smith* court went on to explain:

> The government should not be allowed to do indirectly what it cannot do directly; it cannot require Smith to turn over his pension benefits in a lump sum, nor can it require him to turn over his benefits as they are paid to him. 'Understandably, there may be a natural distaste for the result we reach here. The statute, however, is clear.' *Guidry*, 493 U.S. at 377. Congress has made a policy decision to protect the ERISA income of retirees, 'even if that decision prevents others from securing relief for the wrongs done them.' *Id.* at 376

Smith, 47 F.3d at 684; *see also Boggs v. Boggs*, 520 U.S. 833, 845, 117 S.Ct. 1754, 138 L.Ed.2d 45 (1997)(ERISA's principal objective is to protect plan participants and beneficiaries).

As the foregoing has shown, there is a clear congressional intent behind ERISA that can be gleaned through a review of its legislative history. This legislative history reveals that the purpose behind the anti-alienation clause is "to . . . ensure that the employees' accrued benefits are actually available for retirement purposes." H.R. Rep. No. 93-807, 93d Cong., 2d Sess. (1974) *reprinted in* 1974 U.S.C.A.N.N. 4670, 4734. (App., A-26). There is only one interpretation of the statute that validates its legislative history: namely, the construction adopted by the Fourth Circuit in *Smith*.

3. Treasury Regulation 26 C.F.R. § 1.401(a) – (13).

In their effort to determine the scope of ERISA's anti-alienation provision, various circuit courts have concluded that the funds are inviolate to creditor's claims only until they are distributed to the pensioner by looking to the definitions of "alienation" and "assignment" contained in Treasury Regulation 26 C.F.R. § 1.401(a)-(13)(b). These Courts have construed this regulation as limiting ERISA's anti-alienation protections to "a right or interest enforceable against the plan." *Id.* This construction is unwarranted.

Because the congressional intent of the anti-alienation provision is clear, the Treasury Regulation should not be considered in interpreting the statute. *See Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965)(in absence of clear congressional intent deference is to be given to reasonable agency regulation). Moreover, the interpretation of the regulation advanced by the majority of circuits does not even follow from the regulation's language. The regulation at issue does not state what happens to the benefits once they have been paid out; rather, the regulation only discusses assignment and alienation in the context of enforcing a right or interest *against a plan*. 26 C.F.R. § 1.401(d)–(13)(c). In other words, the regulation is completely silent on the important issue of what happens to benefits once they are in pay status. Therefore, even in the absence of the clear legislative history for this provision, it would be improper to defer to this regulation as it is silent on the precise issue before this Court.

ERISA's legislative history is clear: it was enacted to protect all pension funds for use during retirement. Indeed, as the Fourth Circuit found in *Smith*, the only way to achieve ERISA's principal objective of protecting the ability of plan beneficiaries to use ERISA funds during retirement is to construe the statute as continuing to protect those funds from creditors' claims after they have been paid out to pensioners. To read the provision any other way is to eviscerate ERISA's strong public policy and clear legislative history. The important public policy concerns raised by this issue warrant review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

MICHAEL J. CONNOLLY
Counsel of Record
KELLEY A. JORDAN-PRICE
LAURA B. ANGELINI
HINCKLEY, ALLEN & SNYDER LLP
28 State Street
Boston, MA 02109
(617) 345-9000

United States Court of Appeals,
First Circuit.

Jennifer HOULT,
Plaintiff, Appellee,
v.
David Parks HOULT,
Defendant, Appellant.

No. 02-2128.

Heard May 6, 2004.

Decided June 22, 2004.

Jordan L. Shapiro, with whom Edward J. Collins, *Eric L. Shwartz*, and Shapiro & Hender were on brief, for appellant.

Laura D'Amato, with whom *Adrienne M. Markham*, Kevin P. O'Flaherty, *Pamela L. Signorello*, *Ellen C. Meyer*, and Goulston & Storrs, P.C. were on brief, for appellee.

Before *TORRUELLA*, *LYNCH*, and *LIPEZ*, Circuit Judges.

LYNCH, Circuit Judge.

On July 1, 1993, a federal jury in the district of Massachusetts awarded Jennifer Hoult a $500,000 verdict against her father, David Hoult, for sexually abusing her throughout her childhood. The verdict was affirmed on appeal in *Hoult v. Hoult, 57 F.3d 1, 2 (1st Cir. 1995)*. This case arises from Jennifer's attempt to collect on that judgment, which, almost eleven years later, has still not been paid in full.

On May 13, 2002, the district court found that David had fraudulently conveyed over $130,000 in assets to avoid paying the judgment. Two weeks later, on May 30, it entered an order requiring him to deposit all his income in a designated Massachusetts bank account and to limit his withdrawals from that account to $2,900 per month, a sum meant to cover his reasonable living expenses. David did not appeal from that order. He later moved in the district court to strike from the order social security benefits and Employee Retirement Income Security Act (ERISA) pension benefits that he receives, arguing principally that federal statutes prohibit the alienation of each of those benefits. *See 42 U.S.C. § 407 (a)* (social secu-

rity); *29 U.S.C. § 1056 (d)(l)* (ERISA). The court denied his motion. David, who has since been found in civil and criminal contempt for refusing to comply with the order, now appeals from that denial.

We find that the district court properly denied the motion to strike as to ERISA benefits. ERISA's anti-alienation provision does not apply where, as here, the funds have already been disbursed to the plan beneficiary. In so holding, we join four other circuits and disagree with one.

More difficult questions are raised by the court's refusal to strike social security benefits from the order, but we need not resolve those questions here. The parties stated to the district court that neither had any objection to an arrangement that would exempt David's social security benefits from the order but would reduce his $2,900 monthly withdrawal limit by the amount of his monthly social security check (about $1,400 per month). We confirmed this at oral argument. We affirm the denial of the motion to strike the ERISA pension benefits and remand with instructions to modify the order as to social security benefits.

I.

On July 29, 1993, four weeks after the verdict, Jennifer moved for a preliminary injunction barring David and his current wife (not Jennifer's mother) from transferring David's assets except as necessary for ordinary living expenses. Jennifer alleged that she had discovered that after she had filed suit in July 1988, David had started transferring his assets to protect them from a potential judgment. The district court granted the injunction on August 4. David did not appeal that order.

On September 7, 1994, Jennifer filed a supplemental complaint against David and his wife for fraudulent conveyance and civil contempt. A five-day bench trial was held on the fraudulent conveyance claims in January 1996. *[FN1]*

> *FN1.* The court deferred its consideration of the contempt count to a later date and eventually dismissed it.

In November 1996, before judgment had entered in the fraudulent conveyance trial, Jennifer learned that David had retired from his position as a senior research associate at the Massachusetts Institute of Technology (MIT) and had begun receiving approximately $4,800 in ERISA pension benefits from MIT each month. *[FN2]* On January 27, 1997, she moved to modify the August 4, 1993 preliminary injunction to require, inter alia, that David deposit his monthly ERISA pension check in a designated bank account and limit his withdrawals from that account to $1,700 per month (which, according to his testimony in the fraudulent conveyance trial, was the amount that he contributed each month to his and his wife's living expenses). Her motion did not mention social security benefits. The district court said that it would allow the motion and requested Jennifer's counsel to file a proposed form of order.

> *FN2.* Starting in April 1994, the court had garnished a portion of David's wages each month to pay the judgment, but those payments stopped when David retired in the fall of 1996.

Before the order was issued and before judgment entered in the fraudulent conveyance trial, David filed a volun-

tary petition under Chapter 7 of the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*, which automatically stayed the fraudulent conveyance proceedings. *See 11 U.S.C. § 362.* The bankruptcy court ruled on July 2, 1999 that David's MIT pension was not the property of his bankruptcy estate. It also held on October 29, 1999 that David's judgment debt to Jennifer and interest on that debt were nondischargeable. David appealed both rulings. His appeals were dismissed for lack of prosecution.

On November 22, 1999, Jennifer alerted the district court to the bankruptcy court's rulings and renewed her request to modify the August 4, 1993 order. She again did not mention social security benefits in her motion. David opposed the motion. First, he argued that Florida, not Massachusetts, law applied because he was a Florida resident and maintained a Florida residence in addition to his home in Massachusetts. He contended that Fla. Stat. chs. 222.21(2)(a) and 222.14 exempted his ERISA pension benefits from the claims of all creditors. Second, he argued that the order would effectively be an execution of judgment and that under *Fed.R.Civ.P. 4. 1*, a district court sitting in Massachusetts did not have the authority to execute on the assets of a Florida resident. Finally, he argued that the proposed order would violate ERISA's anti-alienation provision, which states that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." *29 U.S.C. § 1056(d)(1).*

On May 13, 2002, the court entered its findings of fact and conclusions of law as to the fraudulent conveyance claims, funding that David had fraudulently conveyed over $130,000 in assets. [*FN3*] Two weeks later, on May 30, 2002, the court inserted the following language into

the August 4, 1993 preliminary injunction:

> *FN3*. The court entered final judgment to this effect on March 24, 2003.

> 1. David Hoult shall place all monies, income and funds he receives from any source in a single Massachusetts's [sic] bank account in his name only (the "Account") on or before June 14, 2002;
>
> 2. David Hoult shall not make any withdrawals from the Account except for $2,900 per month; and
>
> 3. David Hoult shall provide Plaintiffs attorney ... with (i) the name of the bank and the account number of the Account; (ii) a copy of each check or receipt which documents monies or income he receives; and (iii) a copy of the monthly statement of activity, (the "Monthly Statement") relative to the Account.

The order made no exception for either David's social security or his ERISA pension benefits. Indeed, social security benefits may have been included without the court being aware that "all income" included social security payments.

David did not appeal the May 30 order. Initially, he simply refused to comply with the order and was held in contempt. After he began to comply on July 3, 2002, the court purged him of that contempt. Then, on July 20, 2002, twenty days after the time for filing an interlocutory appeal from the May 30 order had expired, *see Fed. R.App. P. 4(a)(1)(A)*, David filed a motion with the district court to strike social security and ERISA pension benefits from the order. In that motion, he stated, "The instant

motion is directed only to social security and pension benefits. Defendant recognizes that the [May 30 order] remains effective with respect to all other 'monies, income or funds' he receives from any other source." As to his ERISA benefits, David reiterated his earlier arguments under Florida law and under ERISA's ***52** anti-alienation provision. [FN4] He also argued that, as written, the order violated the anti-alienation provision of the Social Security Act, which provides that "none of the moneys paid or payable or rights existing under this title shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." *42 U.S.C. § 407(a).* This was the first time the issue of social security benefits was argued to the court.

> *FN4.* David also raised a new argument that Jennifer had taken the position before the bankruptcy court that his ERISA benefits should be excluded from his estate based on ERISA's anti-alienation provision and, hence, that she should be judicially estopped from seeking the order at issue in this case. David's counsel stated in oral argument before us that he has abandoned this argument on appeal.

Jennifer defended the order as to the ERISA benefits, arguing, inter alia, that ERISA's anti-alienation provision does not prevent alienation of benefits after they have been distributed to beneficiaries and that David's citation to Florida law was inapposite because Massachusetts law, rather than Florida law, applied. As to the social security benefits, Jennifer argued that the order did not violate the Social Security Act's anti-alienation provision because it did not "attach" David's social

security income but merely required him to deposit it in a designated bank account for monitoring. She said that she "would not object, however, if concrete proof of the amount of his social security payment is provided, to excluding that amount from the required income deposit and, concomitantly, reducing the monthly amount David may withdraw by that same amount." David's social security payment is about $1,400 per month; the May 30 order allowed him to withdraw $2,900 per month.

At a hearing on David's motion on August 2, 2002, the district court asked David's counsel whether David had any objection to Jennifer's proposal. He said that David did not. In the end, though, the court decided that it was not necessary to adopt Jennifer's proposal and, instead, simply denied David's motion. The court ruled that the order did not need to be altered as to social security benefits, reasoning that David's disposal of his social security benefits was not restrained in any way because his $2,900 monthly withdrawal limit far exceeded the $1,400 he received in social security benefits. Nor did the order, the Court ruled, have to be amended as to the ERISA benefits. The court held that ERISA's anti-alienation provision presented no bar once the funds had been distributed to David. The court further determined that even if Florida law applied, it did not help David because its relevant provisions applied only to honest debtors and David, based on his history of fraudulent conveyances, was not such a debtor. David filed this appeal from the denial of his motion to strike on September 3, 2002.

While this appeal was pending, David stopped complying with the May 30 order. On May 14, 2003, Jennifer filed a motion to hold David in civil contempt, alleging that David had not produced any of the monthly statements

required under the May 30 order since January 2003. A grand jury indicted David on August 27, 2003 for three counts of felony criminal contempt. The indictment alleged that in January 2003 David stopped depositing his income in the designated Massachusetts account and started putting it in a Florida account instead; that David exceeded his $2,900 withdrawal limit virtually every month since November 2002; and that, by March 2003, there was only about $23 left in the Massachusetts account. On January 16, 2004, the district court granted Jennifer's motion for civil contempt and awarded $46,676 in damages. On February 24, 2004, David pleaded guilty to all three counts of felony criminal contempt.

II.

[1] David does not appeal from the issuance of the May 30, 2002 order but instead from the denial of his motion to strike ERISA and social security benefits from that order. We review the denial of a motion to modify a preliminary injunction for abuse of discretion. *See Pub. Serv. Co. of N.H. v. Patch, 202 F.3d 29, 32 (1st Cir.2000)*; 16 Wright, Miller & Cooper, Federal Practice & Procedure § 3924.2 (West 1996). Under that standard, pure issues of law are reviewed de novo, findings of fact for clear error, and judgment calls with considerable deference. *See Nieves Marquez v. Puerto Rico, 353 F.3d 108, 120 (1st Cir.2004).*

David raises three sets of arguments on appeal. First, he argues that the May 30, 2002 order constitutes an improper execution of judgment under *Fed.R.Civ.P. 69(a).* Second, he argues that the application of the May 30 order to his ERISA pension benefits violates (1) Florida statutes that he reads as exempting such benefits from

creditors' claims, *see* Fla. Stat. chs. 222.21(2)(a), 222.14; and (2) the anti-alienation provision of ERISA, *29 U.S.C. § 1056(d)(1)*. Third, he argues that the order's application to his social security benefits violates the anti-alienation provision of the Social Security Act, *42 U.S.C. § 407(a)*. We consider each argument in turn.

A. Authority to enter the May 30 order

[2] David argues that the May 30 order is effectively an attempt to execute on the judgment and that, on his reading of *Fed.R.Civ.P. 69(a)* a writ of execution is required. [FN5] *Fed.R.Civ.P. 4. 1* requires such writs to be served within the territorial limits of the state in which the district court sits (here, Massachusetts). David claims that he is a Florida resident and that the district court in Massachusetts therefore does not have authority to execute the judgment against him.

> *FN5. Rule 69(a)* provides that "[p]rocess to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise." David argues that the exception for situations in which "the court directs otherwise" applies only when execution is an inadequate remedy and says that no such showing has been made here.

[3] This argument comes too late. On appeal from the denial of a motion to modify an injunction, "review does not extend to the propriety of the original order." 16 Federal Practice & Procedure § 3924.2; *see also Lichtenberg v. Besicorp Group, Inc., 204 F.3d 397, 401 (2d Cir.2000)*. This argument is an attack on the district court's authority to issue the May 30 order (and, indeed, on its power to issue the original August 4, 1993 order),

not the court's refusal to strike ERISA and social security benefits from that order. Accordingly, it is beyond the scope of our review. If David wished to make such a challenge, he should have appealed directly from the May 30 order within the thirty-day appeals period. *See 28 U.S.C. § 1292(a)1)* (interlocutory appeals may be taken from preliminary injunctions); *Fed. R.App. P. 4(a)(1)(A)* (allowing thirty days from the entry of the order to file an appeal).

B. ERISA benefits

We turn to the court's refusal to strike ERISA benefits from the order. We first clear away the issue of whether state law presents any barrier to the May 30 order. The parties dispute whether the order was issued under *Fed.R.Civ.P. 69* (post-judgment executions) or *Fed.R.Civ.P. 64* (pre-judgment orders). Under either rule, the order must comport with the law of the state in which the district court is held (here, Massachusetts), except that any federal statute governs to the extent applicable. *[FN6]*

> *FN6.* David argues that Florida law exempts pension money from all claims of creditors and from all legal process, citing Fla. Stat. chs. 222.21(2)(a), 222.14. But under both *Rule 64* and *Rule 69*, the relevant law is that of Massachusetts, not that of Florida.

[4][5] David raises a belated argument that the order violates Massachusetts law, which requires that "amounts held by a trustee for a defendant in a pension shall be reserved in the hands of the trustee and shall be exempt from attachment." *Mass. Gen. L. ch. 246, § 28* (defining "pension" as including all ERISA pensions). This argu-

ment has been waived, as it was made for the first time in David's reply brief. *Ardresen v. Diorio, 349 F.3d 8, 13 (1st Cir.2003).* Moreover, even were it not waived, the argument fails on the merits. *Section 28* is not applicable because the order does not affect amounts held in trust for David by a third-party; the order directs David himself to deposit pension funds in the designated bank account after those funds reach his hands.

[6] David's primary argument is that the order violates federal law: namely, ERISA's anti-alienation provision, *29 U.S.C. § 1056(d)(1).* Jennifer responds that *§ 1056(d)(1)* does not restrict alienation of pension benefits that have already been distributed to plan beneficiaries. If Jennifer is correct, the May 30 order does not violate *§ 1056(d)(1)* because the order applies only after the pension benefits are disbursed to David each month.

[7] Four of the five courts of appeals to consider the question have construed *§ 1056(d)(1)* as applying to benefits only while held by the plan administrator and not after they reach the hands of the beneficiary. *Wright v. Riveland 219 F.3d 905, 919-21 (9th Cir.2000); Robbins v. DeBuono, 218 F.3d 197, 203 (2d Cir.2000); Guidry v. Sheet Metal Workers Nat'l Pension Fund, 39 F.3d 1078, 1081-83 (10th Cir.1994)* (en banc)*; Trucking Employees of North Jersey Welfare Fund, Inc. v. Colville, 16 F.3d 52, 54-56 (3d Cir.1994).* One court has held that *§ 1056(d)(1)* bars alienation of benefits after distribution to the beneficiary if those benefits are post-retirement annuity payments (but not if they are pre-retirement lump sum payments). *United States v. Smith, 47 F.3d 681, 682-84 (4th Cir.1995).* We join the majority view.

The plain language of *§ 1056(d)(1)* is that "[e]ach pension plan shall provide that benefits provided under the plan

may not be assigned or alienated." That language governs only the plan itself. Standing alone, it "does not read comfortably as a prohibition against creditors reaching pension benefits once they have left the hands of the administrator." *Robbins, 218 F.3d at 203.* If Congress had intended *§ 1056(d)(1)* to reach that far, it could easily have employed the type of language found, for example, in the Veterans Benefits Act *38 U.S.C. § 5301(a)*, which prohibits attachment of benefits "either before or after receipt by the beneficiary." That Congress chose not to do so is significant.

[8] The regulations promulgated by the Secretary of Treasury, who has the authority to implement *§ 1056(d)* of ERISA, *[FN7]* further reinforce our interpretation. Those regulations, which are entitled to deference under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844, 104 S.Ct. 2778 81 L.Ed.2d 694 (1984),* define the terms "assignment" and "alienation" to cover:

> *FN7.* Congress originally delegated this power to the Secretary of Labor. *29 U.S.C. § 1135 (1974).* In 1978, President Carter, pursuant to the Reorganization Act of 1977, 5 U.S.C. §§ 901-12, transferred that authority to the Treasury Secretary, Reorganization Plan No. 4 of 1978, *reprinted in* 1978 U.S.C.C.A.N. 9814, 9815, and Congress ratified that transfer in *1984. Pub. L. No. 98-532,* 98 Stat. 2705 (1984). The Supreme Court has recognized the Treasury regulations as the "applicable administrative regulations" for *§ 1056(d). Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365, 371-72, 110 S.Ct. 680, 107 L.Ed.2d 782 (1990).*

> (i) Any arrangement providing for the payment to the employer of plan benefits which otherwise would be due the participant under the plan, and
>
> (ii) Any direct or indirect arrangement (whether revocable or irrevocable) whereby a party acquires from a participant or beneficiary a right or interest *enforceable against the plan* in, or to, all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary.

26 C.F.R. § 1.401(a)-13(c)(1) (emphasis added). Once benefits are distributed to the beneficiary, a creditor's rights are enforceable against the beneficiary, not against the *plan* itself; accordingly, under the regulations, *§ 1056(d)(1)* does not apply. The Treasury Secretary's interpretation is a reasonable one, and given that *Chevron* deference applies, we decline to disturb it.

The only court to have disagreed with this interpretation is the Fourth Circuit in *Smith*. There, the majority held, over a dissent, that *§ 1056(d)(1)* prohibits alienation of pension funds after the funds are distributed when those funds are received as annuity payments during retirement, but not when those funds are received as a lump sum payment before retirement. *47 F.3d at 683*. The *Smith* majority relied primarily on *Hisquierdo v. Hisquierdo. 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979),* which held that the anti-alienation provision of the Railroad Retirement Act (RRA), *45 U.S.C. § 231m(a),* covers benefits after they are disbursed to beneficiaries. *439 U.S. at 583, 99 S.Ct. 802*; *see* also *Smith, 47 F.3d at 683-84.*

We read the statute differently. Nothing in ERISA or in the regulations supports a distinction in the anti-alienation provision between pre-retirement lump sum payments and post-retirement annuity payments. And *Hisquierdo* is not a useful analogy because of differences in language between the anti-alienation provision of the RRA and that of ERISA. The RRA provides, in relevant part, that:

> Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process *under any circumstances whatsoever*, nor shall the payment thereof be anticipated.

45 U.S.C. § 231m(a) (emphasis added). In concluding that Congress intended *§ 231m* to reach benefits after distribution, the Supreme Court emphasized the fact that the statute was written broadly to prohibit creditors from subjecting the annuity to any "legal process under any circumstances whatsoever." *Hisquierdo, 439 U.S. at 586, 99 S.Ct. 802.* No similarly sweeping language exists in ERISA's anti-alienation provision. *[FN8]*

> *FN8.* Indeed, since *Hisquierdo*, the Supreme Court has expressly reserved judgment on whether ERISA benefits may be alienated after distribution, *see Boggs v. Boggs, 520 U.S. 833, 845, 117 S.Ct. 1754, 138 L.Ed.2d 45 (1997),* suggesting that the Court itself does not view *Hisquierdo* as controlling on that issue.

C. Social security benefits

[9] David also argues that the district court's refusal to strike social security benefits from the order violates the anti-alienation provision of the Social Security Act, *42 U.S.C. § 407(a)*, which provides that

> The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

There is no question that *§ 407(a)*, unlike *§ 1056(d)(1)*, applies to benefits after they have been distributed to beneficiaries. *See Philpott v. Essex County Welfare Bd., 409 U.S. 413, 414-16, 93 S.Ct. 590, 34 L.Ed.2d 608 (1973).*

Jennifer argues, nonetheless, that the May 30 order does not violate *§ 407(a)* because it does not constitute an "execution, levy, attachment, garnishment, or other legal process" within the meaning of *§ 407(a)*. She contends that the order imposes no restraint on David's ability to dispose of his monthly social security check because it allows him to withdraw the full amount of the social security check after depositing it in the designated bank account. His social security check is approximately $1,400 per month; he is allowed to withdraw $2,900 per month. The only effect of the order, Jennifer contends, is to track David's income each month.

David, citing *Robbins, 216 F.3d at 201*, responds that the term "other legal process" is construed expansively to cover all express or implied threats to resort to legal processes such as contempt. He points out that the order requires him, under threat of contempt, to deposit his benefits in a bank account effectively controlled by the court and to report those deposits to Jennifer. That, he argues, is restraint enough to trigger *§ 407*.

The Supreme Court has recently provided some guidance on the interpretation of "other legal process" in *§ 407*. The Court stated that

> "other legal process" should be understood to be process much like the processes of execution, levy, attachment, and garnishment, and at a minimum, would seem to require utilization of some judicial or quasi-Judicial mechanism, though not necessarily an elaborate one, by which control over property passes from one person to another in order to discharge or secure discharge of an allegedly existing or anticipated liability.

Wash. State Dep't of Soc. & Health Servs. v. Estate of Keffeler, 537 U.S. 371, 385, 123 S.Ct. 1017, 154 L.Ed.2d 972 (2003). The question whether the May 30 order "passes control" over David's social security check to the court is a difficult one.

That question, however, is not one that we need to resolve. Both Jennifer and David stated to the district court that they would have no objection to an arrangement that exempted David's social security benefits from the May 30 order, required David to report the amount of his monthly social security benefits, and reduced his

$2,900 monthly withdrawal limit by that amount. Jennifer's counsel reiterated this position to us during oral argument. In light of the parties' mutual amenability, we think the best solution is to remand with instructions to adopt that arrangement.

[10][11] We anticipate that David may claim that he should not be required under *§ 407* even to report the amount of his social security benefits. Any such argument would fail. David has waived the argument and, even had it been preserved, such a reporting requirement would not violate *§ 407*. The arrangement to which David has agreed depends on his accurate reporting of the amount of his benefits.

III.

We *vacate* the denial of the motion to strike as to social security benefits and *remand* with instructions to modify the order to exempt social security benefits, to require David Hoult to report the amount of his social security benefits each month, and to reduce the monthly withdrawal limit by that amount. We *affirm* the denial of the motion to strike in all other respects.

373 F.3d 47, 32 Employee Benefits Cas. 2938

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JENNIFER HOULT,
Plaintiff,
v.
DAVID PARKS HOULT, ET AL.,
Defendants,

CIVIL ACTION
88-1738-DPW

ORDER
May 30, 2002

After hearing on and consideration of Plaintiff's Motion to Amend Order, it is hereby ordered that the Order of this Court dated August 4, 1993 as modified on November 3, 1993 (the "Order") is further modified. In addition to all other provisions of the Order, which remain in full force and effect, the Order is further modified as follows:

1. David Hoult shall place all monies, income and funds he receives from any source in a single Massachusetts's bank account in his name only (the "Account") on or before June 14, 2002;

2. David Hoult shall not make any withdrawals from the Account except for $2,900 per month; and

3. David Hoult shall provide Plaintiff's attorney, Adrienne M. Markham, Esq., c/o Goulston & Storrs, 400 Atlantic Avenue, Boston, MA 02110-3333, with (i) the name of the bank and the account number of the Account; (ii) a copy of each check or receipt which documents

monies or income he receives; and (iii) a copy of the monthly statement of activity (the "Monthly Statement") relative to the Account. David Hoult shall provide the copies of the documents and/or the information described above in (i), (ii) and (iii) within five days of the date David Hoult receives such documents or information.

s/Douglas P. Woodlock
DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Jennifer HOULT,
Plaintiff,
v.
David P. HOULT,
Defendant, and

Zene Athans HOULT,
Intervenor-Defendant.

CIVIL ACTION NO. 88-1738-DPW

DEFENDANT DAVID P. HOULT'S MOTION TO STRIKE THOSE PORTIONS OF THE ORDER (PAPER NO. 389] RELATING TO SOCIAL SECURITY AND ERISA PENSION BENEFITS

8/2/02 DENIED, for reasons stated during – and reflected in the stenographer's notes of – the hearing this day.
Douglas P. Woodlock,
USDF

A-22

UNITED STATES CODE

Congressional and Administrative News

93rd Congress — Second Session
1974

Convened January 21, 1974
Adjourned December 20, 1974

Volume 3
LEGISLATIVE HISTORY

ST. PAUL, MINN.
WEST PUBLISHING CO.

[4639] RETIREMENT INCOME SECURITY ACT
P.L. 93—406
EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974
P.L. 93-406, see page 935
House Report (Education and Labor Committee)
No. 93-533,
Oct.2,1973 [To accompany H.R. 2]

House Report (Ways and Means Committee)
No. 93-807,
Feb. 21, 1974 [To accompany H.R. 12855]

Senate Report (Labor and Public Welfare Committee)
No. 93-127,
Apr.18,1973 [To accompany S. 4]

Senate Report (Finance Committee) No. 93-383,
Aug. 21,1973
[To accompany S. 1179]

House Conference Report No. 93-1280, Aug.12,1974
[To accompany H.R. 2]

Senate Conference Report No.93-1090, Aug.13,1974
[To accompany H.R. 2]

Cong. Record Vol. 120 (1974)

DATES OF CONSIDERATION AND PASSAGE
House February 28, August 20,1974

Senate March 4, August 22, 1974

The House and Senate Reports and the House Conference Report are set out.

SENATE REPORT NO. 93-127

[4849] time available, were afforded ample opportunity to present their views with respect to proposed legislation. Additionally, those whose requests to testify could not be honored due to limitations of time, were encouraged to submit statements and views for consideration by the staff. Many of these resulted in subsequent conferences to discuss the merits of objections and suggestions. A number of suggestions were meritorious and constructive and were subsequently incorporated into the bill.

Because of the Subcommittee concern with the effects which the projected costs of mandatory vesting might impose upon pension plans, the Subcommittee, through tho actuarial firm of Grubbs & Company, Baltimore, Maryland, conducted its own actuarial study and evaluation of estimated increases in pension plan costs resulting from vesting provisions. This study, conducted by a recognized and qualified actuarial firm, permitted the Subcommittee to assess the range of increased costs to private pension plans which might be anticipated as a result of enactment of S. 3598. A summary of the Subcommittee cost study is attached as Appendix.

The Subcommittee's implementation of its study, as mandated by Senate resolution, was methodical and analytical. It undertook initially, through its inquiries and fact-finding, to define the specific problems of private pension plans in the United States. When the problems were sufficiently identified, a comprehensive analysis of each was made by the Subcommittee staff. The analysis was essen-

tial in order to determine the need and extent of reform essential to meet the deficiencies and problems surfaced.

In considering S. 4 and other legislation, the Subcommittee was of the opinion that, based upon its findings, it would be unwise and impractical to propose either revisions or new provisions of law in patchwork fashion. It was convinced that the nature and extent of the problems determined to exist required one omnibus legislative proposal which would embody essential and indispensable reforms.

V. Committee Action and Explanation of Amendments

The Committee enthusiastically endorses the concept of a comprehensive private pension reform program. It believes that expeditious enactment of S. 4 will institute a program which will achieve a strengthening of the role played by private retirement plans within the fabric of our economic and social structures. Its most important purpose will be to assure American workers that they may look forward with anticipation to a retirement with financial security and dignity, and without fear that this period of life will be lacking in the necessities to sustain them as human beings within our society. The enactment of progressive and effective pension legislation is also certain to increase stability within the framework of our nation's economy, since the tremendous resources and assets of the private pension plan system are an integral part of our economy. It will also serve to restore credibility and faith in the private pension plans designed for American working men and women, and this should serve to encourage rather than diminish efforts by management and industry to expand pension plan coverage and to improve benefits for workers.

The committee believes that the legislative approach of establishing minimum standards and safeguards for private pensions is not only consistent with retention of the freedom of decision-making vital

HOUSE REPORT NO. 93-807

[4734] (or to which the new provisions would not apply for some years into the future) may offer joint and survivor options if they wish to do so. The mandatory provisions of the bill will not apply unless that participant's annuity starting date is on or after the effective date with regard to that plan and would not apply unless that participant was an active participant in the plan on or after that effective date.

Plan mergers. —The committee bill contains a provision (sec. 1021) to ensure that the rights of participants are fully protected in the event of plan mergers. Under this provision, which applies to any plan merger occurring after October 22, 1973, each participant must be entitled to receive a benefit immediately after the merger (determined as if the plan then terminated) which has not less than the value of the benefit he would have been entitled to receive immediately before the merger (determined as if the plan then terminated). Moreover, the funding of his accrued benefit must be at least as adequate after the merger as it was before the merger. Without such a provision, the committee was concerned that the rights of plan participants might be diluted in some instances, as the result of plan mergers. As a further safeguard, the bill requires that in the case of any plan merger which occurs after enactment, the plan administrator must give 30 days notice to the Internal Revenue Service, including an actuarial statement indicating that the requirements of the bill have been met.

Alienation. —To further ensure that the employee's accrued benefits are actually available for retirement purposes, the committee bill also contains a provision requiring the plan to provide that benefits may not be assigned or alienated. (Of course this provision is not intended to prevent the transfer of benefit rights from one qualified plan to another.)

Nevertheless, a plan will be permitted to provide for voluntary and revocable assignments (not to exceed 10 percent of any benefit payment).

This provision is not intended to interfere with the current practice in many plans of using vested benefits as collateral for reasonable loans from the plans, where the "prohibited transactions" provisions of present law (sec. 503 of the Code) and other fiduciary requirements are not violated.

Benefits of terminated participants.—Protection is given to retired individuals and individuals who are separated from the service of the employer against reductions in private plan benefits when social security benefit levels increase. In general, under present integration procedures, social security benefits attributable to employer contributions are treated as though they were part of the private plan. As a result when the level of social security benefits increases, some integrated plans have reduced the amount of the retirement benefits that they provide for covered employees.

Present law under administrative practice provides that qualified plans may not use increases in social security benefit levels to reduce the benefits that they pay where the employees concerned are retired and already receiv-

ing integrated plan benefits. The bill codifies this treatment for retired persons. It also extends the prohibition against reducing plan benefits where social security benefit levels are increased to cases where the individuals concerned are separated from service prior to retirement and have deferred nonforfeitable rights to plan benefits. This provision is effective for increases in social security benefits which

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[5037] remains with his company. The trusteeship of the fund by three Secretaries causes needless confusion and duplication of effort. It is much simpler and more reasonable that the Secretary of Labor alone be the managing trustee of the fund.

C. THE HARTKE APPROACH

I will propose the establishment of a compulsory portability fund into which an employee's vested benefits would automatically be transferred. The employer would have a maximum of 5 years to pay these vested benefits into the portability fund.

The private sector should be given an initial opportunity of at least 18 months to develop plans for the organization of a portability fund. If they fail to act, the Secretary of Labor would establish the plans for portability funds. I strongly believe that these efforts should be made to keep pension monies within the private sector.

Tho central portability fund should also have the option of offering basic plans of pension coverage to companies that do not have any. Such plans would be limited to employers with 300 employees or less. This service would

be particularly beneficial to smaller companies who can not afford the high costs of establishing and operating pension programs. We must make a strong effort to expand the private pension industry to cover the millions of Americans not presently enrolled.

VII. CONCLUSION

These are among the changes to the committee's proposal which I propose to bring real reform to the private pension system in this Nation. I emphasize that we should not accent any illusions of reform but rather we should have the courage to help the 34 million working men and women who are enrolled in pension plans. When the Senate begins debate on pension reform, I intend to initiate a full discussion of the issues which I have raised in this statement.

Vance Hartke.

IX. SUPPLEMENTAL VIEWS OF MR. CURTIS

This legislation is important to our private pension programs in the United States. It carries many provisions which I advocate and endorse. I am especially interested in the provisions which make it possible for an individual not covered by a company pension or an H.R. 10 pension to set aside for his own retirement and have the tax advantages that other plans have. This is a matter that I have worked for for many years.

In general, I would have preferred to have had the enactment of my own bill, S. 1631, which was supported by the Administration. The provisions of that bill are more acceptable in several respects including the issue of professional corporations.]

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[5061] (particularly those having multiemployer plans) may have in contacting all of their participants.

To prevent adverse selection the plan may provide that any election, or revocation of an election, is not to become effective if the participant dies within some period of time (not in excess of two years) of the election or revocation (except in the case of accidental death where the accident which causes death occurs after the election).

Also, the conferences agree with the statements in the Ways and Means Committee report (No. 93-807) to the effect that the bill does not require the plan to "subsidize" the joint and survivor feature (although the plan is permitted to do so) and that plans may make reasonable actuarial adjustments to take account of the possibility that total costs of the plan otherwise might be increased because of adverse selection.

Alienation

Under the conference substitute, a plan must provide that benefits under the plan may not be assigned or alienated. However, the plan may provide that after a benefit is in pay status, there may be a voluntary revocable assignment (not to exceed 10 percent of any benefit payment) by an employee which is not for purposes of defraying the administrative costs of the plan. For purposes of this rule, a garnishment or levy is not to be considered a voluntary assignment. Vested benefits may be used as collateral for reasonable loans from a plan, where the fiduciary requirements of the law are not violated. [4]

[4] This rule will not apply to irrevocable assignments made before the date of enactment and the plan provision required under this rule need not be adopted prior to January 1, 1976

Social Security Benefits of Terminated Participants

The conference substitute codifies the current administrative practice which provides that qualified plans may not use increases in social security benefits or wage base levels to reduce employee plan benefits that are already in pay status. A similar protection is also extended against reductions in plan benefits where social security benefit levels (or wage base levels) are increased after the individuals concerned are separated from service prior to retirement. This requirement also applies to plans covered under title I (even if the plan is not qualified). A similar principle will apply in the case of an individual receiving disability benefits under social security and also under an employer plan.

Integration with Social Security

As discussed above, title I and title II of the conference substitute provide that plans may not use increases in social security benefit levels to decrease plan benefits in the case of retirees, or individuals who separate from service prior to retirement. The conference substitute also provides (consistent with the Ways and Means Committee report) for a two-year study, by the Congress, of the issues involved in the integration of private pension plans with social security.

Consequently, the substitute provides, in effect, that until July 1, 1976, pension plans may not increase their level of integration by taking into account changes in the social security wage base, or in social security benefit levels after 1971. Thus, in general, plans may integrate in

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(so long as the plan complies with the substance of this rule after enactment).

accordance with Rev. Rul. 71-446,1971-2 C.B. 187. (For example, an excess plan would integrate in accordance with section 3 of that.

Forfeiture of served benefits derived from employer contributions

(c) No pension plan may provide that any part of a participant's accrued benefit derived from employer contributions (whether or not otherwise nonforfeitable) is forfeitable solely because of withdrawal by such participant of any amount attributable to the benefit derived from contributions made by such participant. The preceding sentence shall not apply (1) to the accrued benefit of any participant unless, at the time of such withdrawal, such participant has a nonforfeitable right to at least 5 percent of such accrued benefit, or (2) to the extent that an accrued benefit is permitted to be forfeited in accordance with section 1053 (a) (3) (D) (iii) of this title.

Assignment or alienation of plan benefits

(d)(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

(2) For the purposes of paragraph (1) of this subsection, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment, or of any irrevocable assignment or alienation of benefits executed before September 2, 1974. The preceding sentence shall not apply to any assignment or alienation made for the purposes of defraying plan administration costs. For purposes off this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan

is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 4975 of Title 26 (relating to tax on prohibited transactions) by reason of section 4975 (d) (l) of Title 26. Pub.L. 93-406, Title I, § 206, Sept. 2, 1974, 88 Stat. 864.

References In Text. Title II of the Social Security Act, referred to in subsec. (b), is classified to section 401 et seq. of Title 42. The Public Health and Welfare.

The Railroad Retirement Act of 1937, referred to in subsec. (b), is classified to section 228a et seq. of Title 45, Railroads.

Effective Date. Subsecs. (a) - (c) of this section applicable in the case of plan years beginning after Sept. 2, 1974, except as otherwise provided in section 1061 of this title, see section 1061 (a) of this title.

Subsec. (d) of this section applicable with respect to plan years beginning after Dec 31, 1975, except as otherwise provided in section 1061 (d) of this title, see section 1061 (b) (I) of this title.

In the case of plans in existence on Jan. 1, 1974, this section applicable in the case of plan years beginning after Dec. 31, 1975, except as otherwise provided in section 1061 (c) and (d) of this title, see section 1061 (b) (2) of this title.

Legislative History. For legislative history and purpose of Pub.L. 93-406, see 1974 U.S. Code Cong. and Adm. News, p. --.

§ 1057. Temporary variances from certain vesting requirements

In the case of any plan maintained on January 1, 1974, if not later than 2 years after September 2, 1974, the administrator petitions the Secretary, the Secretary may prescribe an alternate method which shall be treated as satisfying the requirements of section 1053(a) (2) or 1054(b) (1) (other than subparagraph (D) thereof) of this title or both for a period of not more than 4 years. The Secretary may prescribe such alternate method only when he finds that—

(1) the application of such requirements would increase the costs of the plan to such an extent that there would result a substantial risk to the voluntary continuation of the plan or a substantial curtailment of benefit levels or the levels of employees' compensation.

(2) the application of such requirements or discontinuance of the plan would be adverse to the interests of plan participants in the aggregate, and

(3) a waiver or extension of time granted under section 1083 or 1084 of this title would be inadequate.

In the case of any plan with respect to which an alternate method has been prescribed under the preceding provisions of the subsection for a period of not more than 4 years, if, not later than 1 year before the expiration of such period, the administrator petitions the Secretary for an extension of such alternate method, and the Secretary makes the

29 § 1056

(d) Assignment or alienation of Plan benefits

(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated

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26 C.F.R. § 1.401(a)-13 Assignment or alienation of benefits

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(b) No assignment or alienation—(1) General rule. Under section 401(a)(13), a trust will not be qualified unless the plan of which the trust is a part provides that benefits provided under the plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process.

(2) Federal tax levies and judgments. A plan provision satisfying the requirements of subparagraph (1) of this paragraph shall not preclude the following:

(i) The enforcement of a Federal tax levy made pursuant to section 6331.

(ii) The collection by the United States on a judgment resulting from an unpaid tax assessment.

(c) Definition of assignment and alienation—(1) In general. For purposes of this section, the terms "assignment" and "alienation" include—

(1) Any arrangement providing for the payment to the employer of plan benefits which otherwise would be due the participant under the plan, and

(ii) Any direct or indirect arrangement (whether revocable or irrevocable) whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary.